Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

THE ESTATE OF BERNICE MENNA; DANIEL MENNA, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BERNICE MENNA,

Petitioners,

vs.

ST. AGNES MEDICAL CENTER,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should there be a Uniform Federal Enforcement of the False Claims Act (31 U.S.C.A. §3729 et seq.) when it has been determined that a hospital has concealed, destroyed and falsified medical records in violation of the Medicare Health Act (42 U.S.C.A. §1395 et seq.) and Federal Regulations (Fed. Red. Vol. 49 No. 1 Jan. 3, 1984 §405.472)?

2. If a Hospital "dumps" a medicare patient in 1984 and conceals its misconduct until 1994 is it subject to the Medicare Anti Dumping Act of 1986 (Emergency Medical Treatment and Active Labor Act 42 U.S.C.A. §1395 dd)? If the act applies to concealed past misconduct should patients and their families who discover the violations of the Medicare Act and False Claims Act be protected from penalties designed to frustrate investigation?

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OPINION IN THE COURT BELOW

The Order of the U.S. Court of Appeals for the Third Circuit is reproduced as Appendix A. The opinion of the United States District Court for the Eastern District of Pennsylvania are reproduced as Appendix B.

JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit was entered on September 5, 1995. A Petition for Rehearing en banc was denied on October 12, 1995. (Appendix C). This petition was filed within ninety days of that date, the Court has jurisdiction to review the judgment of the Court of Appeals under 28 U.S.C.A. §1254(1).

FEDERAL CASES INVOLVED

UNITED STATES VS. KIMBELL FOODS, INC. 400 U.S. 715, 99 S.Ct. 1448 (1979) COLORADO RIVER WATER CONSERVATION DISTRICT VS. UNITED STATES, 424 U.S. 800, 47 L.Ed. 483 (1976) HAZEL-ATLAS GLASS CO. VS. HARTFORD EMPIRE CO., 322 U.S. 238 (1943)

STATEMENT OF THE CASE

During the fall of 1985 the Late Senator John Heinz conducted hearings before the Special Committee on Aging of the U.S. Senate for the Ninety-Ninth Congress. The Committee issued a two volume report titled: *Quality*

of Care Under Medicare's Prospective Payment System Serial Nos. 99-9, 10, 11.

Senator Heinz opened the October 4, 1995 hearings by stating in part:

> Hospitals denying admission to what they consider DRG losers and creating winners through premature discharge; pressure on doctors to violate their own medical judgment in treating patients; a hamstrung enforcement power-this was the bad news from the September 26 hearing . . . ibid Volume I, page 117.

On November 12, 1985, the Committee chaired by Senator John Heinz made the following finding:

> At two hearings held during September and October of this year by the Committee, witnesses from fourteen states, including beneficiaries, advocates, and health care professionals, testified that premature and inappropriate discharges from hospitals are causing a great deal of suffering, confusion and loss of life . . . ibid Volume I, page 372.

Under Medicare a hospital, of course, receives funds for medicare patients. In order to profit from medicare, a hospital must promptly discharge patients without any correlation between proper treatment and cost of treatment; the latter takes precedence. By finding patients to be healthy on paper, the patient is discharged prematurely and the hospital keeps more of the Medicare funds.

Recently discovered evidence herein shows that St. Agnes discharged Mrs. Menna suffering from a stroke twice within two (2) weeks asserting that she did not

have a stroke. The hospital prepared false records, overruled the opinion of two doctors and later destroyed records. It was a classic example of abuse as illustrated by the late Senator Heinz.

When Dr. Victor was shown the fraudulent entry attributed to him he prepare a letter supported by an Affidavit to repudiate St. Agnes' entry related to Mrs. Menna:

> I had not seen this entry before in my previous review of whatever documentation you had sent to me. Apparently, this was a relatively new finding. As I reviewed the chart entry it did not cause any recollections to be stirred in my memory as far as I am concerned this was a new entry by the then intern or resident on our service and in as much as my co-signature or additional notes are not written on the progress note I suggest to you that I was not present at the time of the writing of that note. Not only that, it is very likely that I never saw that note. R-768.

The hospital violated the Medicare Health Act (42 U.S.C.A. §1395 et seq.) and False Claims Act (31 U.S.C.A. §3729 et seq.).

The hospital also violated the intent of the Medicare Health Act "to insure that adequate medical care is available to the aged throughout this country." *Hultzman vs. Weinberger,* 495 F.2d 1276, 1281 Col. 1 (3rd Cir. 1974).

The hospital also violated Federal regulations found in the Federal Register Vol. 49 No. 1 Tues. January 3, 1984 § 405.472 *Conditions for payment under the prospective payments system.*

Dr. Ian Lawson, a Medicare expert examined to newly discovered records and stated:

> Nevertheless, the attending physician countersigned a discharge summary that records 'Utilization review failed to allow extra days because the patient *was felt* (Passive voice) to be medically stable . . . ' Reference is made to 'utilization review's *disallowance* of further stay', as well as to the implacability of the U.R. committee decision. To further make the point, there were two 'Utilization Review Division' *stickers* on the medical record (*in many hospitals commonly in a warning red or yellow color*) reading 'Expected Discharge Date' – 2/14 on the one dated 2/13 and 2/15 on the one dated 2/14. Under such pressure, the physician abrogated his responsibility for the patient, it appears, and discharged her. In that utilization review process of St. Agnes was so obstrusively and explicitly involved (being written in to the patient's medical record) and was inferred by the attending physician(s) or their surrogate (the medical resident) to exercise an authority that even Medicare law then or now does not support (see attached), there must be questions about the discoverability as well as cultivation of the process at St. Agnes hospital. (Exhibit "R" of Complaint) "App. 219"

With this new evidence the Petitioners filed the present action which the District Court stayed. The Third Circuit affirmed.

The state case is pending before the Pennsylvania Supreme Court however, no lower level court would allow any discovery regarding the newly discovered Medicare records.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

This Honorable Court has jurisdiction over the within matter because the Hospital concealed, destroyed and falsified medical records in violation of the Medicare Health Act (42 U.S.C.A. §1395 et seq.). Such misconduct would make the hospital subject to the False Claims Act (31 U.S.C.A. §3729 et seq.). Because the hospital's conduct is a violation of Federal Statutes, the U.S. District Court has jurisdiction over this matter.

The hospital also violated the intent of the Medicare Health Act "to insure that adequate medical care is available to the aged throughout this country." *Hultzman vs. Weinberger,* 495 F.2d 1276 (3rd Cir. 1974).

The hospital also violated Federal regulations found in the Federal Register Vol. 49 No. 1, Tues. January 3, 1984 §405.472 *Conditions for payment under the prospective payments system.*

For the above stated reasons the Petitioners believe that the Federal Courts have the exclusive jurisdiction to hear this matter.

1. MEDICARE IS A FEDERAL PROGRAM WHICH SHOULD BE SUBJECT TO THE EXCLUSIVE REVIEW OF THE FEDERAL COURTS

In *Sun Towers, Inc. vs. Heckler,* 725 F.2d 314 (5th Cir. 1984) stated:

A. Medicare.

> This care arises under Title XVIII of the Social Security Act, known as the Medicare program. 42 U.S.C. §§ 1395a-1395xx. This legislation provides for federal reimbursement of medical care for the aged and certain disabled persons . . . 725 F.2d at 318.

In *Blue Cross and Blue Shield Ass'n vs. Sullivan,* 794 F. Supp 1166 (D.D.C. 1992) the Court stated:

> Medicare, which is authorized by Title XVIII of the Social Security Act, is an extensive federally funded program that provides health insurance for the aged and the disabled . . . 794 F.Supp at 1168.

In *United States vs. Pisani,* 646 F.2d 83 (3rd Cir. 1981) the Court ruled:

> We hold that here a uniform federal rule is needed since state law could frustrate specific objectives of the Medicare program. One objective is prompt reimbursements to providers. Interim payments to providers must be made quickly so that they will be encouraged to treat Medicare patients. 646 F.2d at 86.

The *Pisani* court quoted the case of *United States vs. Kimbell Foods, Inc.,* 440 U.S. 730, 99 S.Ct. 1448 (1979) which stated:

> Undoubtedly, federal programs that 'by their nature are and must be uniform in character throughout the Nation' necessitate formulation of controlling federal rules. Apart from considerations of uniformity, we must also determine whether application of state law would frustrate specific objectives of the federal programs. If so,

> we must fashion special rules solicitous of those federal interests. . . . 440 U.S. 730 at 1458.

So it is clear that Medicare is a federal program which is subject to Federal Laws. In the present case, the lower court surrendered jurisdiction to the State Court of Pennsylvania which refuse to allow any discovery regarding the newly discovered evidence and ruled that there was no concealment or fraud.

2. THE FALSE CLAIMS ACT IS DESIGNED TO DISCOURAGE FRAUD AGAINST THE GOVERNMENT AND SHOULD BE UNDER THE EXCLUSIVE JURISDICTION OF THE FEDERAL COURTS

In *Robertson vs. Bell Helicopter Textron, Inc.*, 32 F.3d 948 (5th Cir. 1994) the Court states:

> The purpose of the False Claims Act, of course, is to discourage fraud against the government, and the whistleblower provision is intended to encourage those with knowledge of fraud to come forward . . . 32 F.3d at 951.

In *Neal vs. Honeywell, Inc.*, 826 F. Supp. 266 (N.D. Ill 1993) the Court stated:

> The purpose of the False Claims Act is of course, to discourage fraud against the government. Concomitantly, the purpose of the qui tam provision of the Act is to encourage those with knowledge of fraud to come forward. See H.R. Rep. No. 660, 99th Cong., 2d Sess. 22 (1986) . . . 826 F. Supp. at 269.

Since the False Claims Act is designed to protect the Government and ultimately the taxpayers from fraud,

and since Medicare is subject to the uniform application of Federal law; it is appropriate that the Federal Court has jurisdiction in this case.

3. PATIENTS AND THEIR FAMILY WHO DISCOVER VIOLATIONS OF THE MEDICARE ACT AND THE FALSE CLAIMS ACT MUST BE PROTECTED FROM PENALTIES DESIGNED TO FRUSTRATE INVESTIGATION

Mrs. Menna's Estate filed this action under the Medicare Act (42 U.S.C.A. §1392 et seq.) and the False Claims Act (31 U.S.C.A. §3729 et seq.). Because the documentation shows that St. Agnes *actively* concealed evidence it may have placed itself subject to the Medicare anti-dumping law (42 U.S.C.A. §1395 dd) which provides:

> (i) Whistleblower protections
>
> A participating hospital may not penalize or take adverse action against a qualified medical person described in subsection (c)(1)(A)(iii) or a physician because the person or physician refuses to authorize the transfer of an individual with an emergency medical condition that has not been stabilized or against any hospital employee because the employee reports a violation of a requirement of this section.

The False Claims Act under 31 U.S.C.A. §3730(h) also provides:

> Any employee who is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment by his or her employer because of lawful acts done by the

> employee on behalf of the employee or others in furtherance of an action under this section, including investigation for, initiation of, testimony for, or assistance in an action filed or to be filed under this section, shall be entitled to all relief necessary to make the employee whole. Such relief shall include reinstatement with the same seniority status such employee would have had but for the discrimination, 2 times the amount of back pay, interest on the back pay, and compensation for any special damages sustained as a result of the discrimination, including litigation costs and reasonable attorneys' fees. An employee may bring an action in the appropriate district court of the United States for the relief provided in this subsection.

In *Neal vs. Honeywell,* 826 F. Supp. 266 (N.D. Ill 1993) the Court stated:

> It is clear that the statutory protections of section 3720(h) extend to persons who bring a qui tam action, pursuant to section 3730(b), for violations of the Act. See e.g. *Coleson vs. Inspector General of the Dep't of Defense,* 721 F.Supp. 763, 765 (E.D. Va. 1989). It is also clear that protected conduct under section 3730(h) extends beyond the actual qui tam relator to others involved in the suit, including any person who initiated, investigated, testified, or assisted in 'an action filed or to be filed' under the Act. 31 U.S.C. § 3730(h).

The Third Circuit rule LAR 108.1 *Application for fee,* section (c) states:

> (c) the application shall include a short statement of the authority pursuant to which the party seeks the award. The application shall also

> show the nature and extent of services rendered and the amount sought, including an *itemized* statement in affidavit form from the attorney stating the *actual time* expended and the rate at which fees are computed, together with a statement of expenses for which reimbursement is sought.

Remarkably without any itemized statement or the actual time employed the panel awarded St. Agnes over Eight Thousand ($8,000.00) Dollars in attorney's fees and refused to stay the mandate. Appendix D and F The Menna family petitioned for a rehearing en banc on the award of attorney's fee but it appears from the panel's order that the full court did not consider the petition. Appendix F

Following the panel's award, counsel for St. Agnes wrote to Petitioner's counsel and advised that it would waive the penalty if all present and future actions against St. Agnes were dropped and as a consequence all investigation would end.

The Menna children have determined through documents and through expert guidance that their mother was a victim of Medicare dumping. Because they exposed wrongful conduct by St. Agnes they should not be punished. In addition, this appeal was not frivolous because when St. Agnes questioned the Court's jurisdiction it was the *panel* that allowed the appeal to proceed.

Finally, there was merit at law to Bernice Menna's appeal based upon the decision of the U.S. Supreme Court in *Colorado River Water Conservation District vs. United States,* 424 U.S. 800, 47 L.Ed. 483 (1976). The decision made herein was as close as the five to four holding

made in the Colorado case itself. The majority opinion reversing the Court of Appeals of the Tenth Circuit acknowledged that:

> Generally, as between state and federal courts, the rule is that 'the pendency of an action in the state court is no bar to proceedings concerning the same matter in the Federal court having jurisdiction . . . '*McClellan vs. Carland*, supra, 217 U.S. at 282, 30 S.Ct. at 505, 54 L.Ed. at 767. See *Donovan vs. City of Dallas*, 377 U.S. 408, 84 S.Ct. 1579, 12 L.Ed.2d 409 (1964). As between federal district courts, however, through no precise rule has evolved, the general principle is to avoid duplicate litigation. See *Kerotest Mfg. Co. vs. C-O Two Fire Equipment Co.*, supra; *Steelman vs. All Continent Corp.*, 301 U.S. 278, 57 S.Ct. 705, 81 L.Ed. 1085 (1937); *Landis vs. North American Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 165, 81 L.Ed. 153, 158 (1936). This difference is general approach between state-federal concurrent jurisdiction and wholly federal concurrent jurisdiction stems from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them. *England vs. Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 1415, 84 S.Ct. 461, 464, 11 L.Ed.2d 440, 444 (1964); *McClellan vs. Carland, supra*, 217 U.S. at 281, 30 S.Ct. at 504, 54 L.Ed. at 766; *Cohens vs. Virginia*, 6 Wheat. 264, 404, 5 L.Ed. 257 (1821).

Here, neither the District Court nor the Court of Appeals undertook " . . . the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Colorado River Conservation District*, supra. Both the majority opinion and the dissenting opinions make it clear that the decision in *Colorado River* applied uniquely to the

circumstances of that case by weighing various factors for and against the exercise of jurisdiction.

It appears that the Court must take jurisdiction over this case and that the penalty against the Menna family is inappropriate.

CONCLUSION

The Petitioners produced reports from six (6) doctors who found misconduct by the Hospital yet the state courts found no misconduct and refused to allow any discovery.

In *Averbach vs. Rival,* 809 F.2d 1016 (3rd Cir. 1987) and 879 F.2d 1196 (3rd. Cir. 1989), the Third Circuit found that fraud in discovery was actionable.

In *U.S. vs. Eisen,* 974 F.2d 246 (2nd Cir. 1992) the Court made the following observation:

> In *United States vs. Rodolitz,* 786 F.2d 77 (2d Cir.), cert. denied, 479 U.S. 826, 107 S.Ct. 102, 93 L.Ed.2d 52 (1986), the defendant had brought a fraudulent civil action against his insurance company and recovered a money judgment from the company at trial. In affirming the defendant's conviction for mail fraud, this Court explicitly recognized that false evidence at a civil trial works a fraud not only on the jury but on the opposing party as well . . . 974 F.2d at 253.

In *Publicker vs. Shallcross,* 106 F.2d 949 (3rd Cir. 1939) the Third Circuit once stated:

> We believe truth is more important than the trouble it takes to get it. 106 F.2d at 952.

It appears that the Third Circuit no longer follows this principle. It now has surrendered jurisdiction of the Medicare Act and enforcement of the False Claims Act to the state courts.

Finally, the Petitioners wish to direct the Court's attention to another case in which the Third Circuit also reviewed the presence of fraud. In *Hazel-Atlas Glass Co. vs. Hartford Empire Co.*, 322 U.S. 238 (1943) the Supreme Court stated in part:

> Furthermore, tampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud. 322 U.S. at 246.

The Petitioners request that this matter be remanded to the District Court so that discovery may be taken.

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JOHN J. O'BRIEN, III
Attorney for Petitioners

January 8, 1996

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2040

THE ESTATE OF BERNICE MENNA; DANIEL MENNA, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BERNICE MENNA,

Appellants,

v.

ST. AGNES MEDICAL CENTER,

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 94-2424)
District Judge: Donald W. VanArtsdalen

Submitted Under Third Circuit LAR 34.1(a)
Thursday, August 24, 1995

Before: GREENBERG, COWEN, and SAROKIN,
Circuit Judges

(Filed Sept. 5, 1995)

MEMORANDUM OPINION OF THE COURT

SAROKIN, *Circuit Judge.*

The district court stayed this wrongful death action pending disposition of a previously-filed state court proceeding, which the district court determined would have res judicata effect on this action. Plaintiffs appeal from entry of the stay. We will affirm.

I.

A brief recitation of the state court proceedings makes manifest the wisdom of the district court's decision. Plaintiff estate first brought suit in Pennsylvania state court in 1985, alleging that the death of decedent Bernice Menna had been caused by the negligence and malpractice of defendant St. Agnes Medical Center ("St. Agnes" or "the hospital"), a physician, and a medical group. After more than two years of litigation, the estate stipulated in 1987 to the dismissal "with prejudice" of all claims against the hospital. Appendix ("App.") at 285. Due to a clerical error, the stipulation was docketed as a dismissal "without prejudice." App. at 309.

Having obtained new counsel, the estate moved in 1990 to strike the dismissal of St. Agnes, relying on the erroneous docket sheet and an assertion that the stipulation was entered into without the estate's knowledge or consent. App. at 308-07. In a flurry of activity, as to St. Agnes the estate also (1) filed a second complaint alleging negligence and medical malpractice, but adding claims for punitive damages, violation of the Pennsylvania Unfair Trade and Consumer Protection Act ("PUTCPA"), and for losses suffered by the decedent's children; (2) moved to amend the original complaint to add the new claims contained in the second complaint; and (3)

brought a separate malpractice action against plaintiffs' original counsel. The state court denied the motion to strike the dismissal, denied in part the motion to amend, and dismissed the second complaint on the grounds of *lis pendens*. In 1991 these orders were affirmed on appeal, and the Pennsylvania Supreme Court denied the petition for leave to appeal.[1]

Undaunted, in 1993 plaintiff estate returned to state court to renew its attack on the 1987 stipulation of dismissal. This time plaintiffs moved for reconsideration, repeating its contention that prior counsel had never consulted it regarding the dismissal of St. Agnes and adding the assertion that newly discovered evidence revealed St. Agnes had fraudulently concealed medical records.

Meanwhile, Daniel Menna, individually and as administrator of the decedent's estate, commenced the instant action in district court in 1994, before the state court had decided its motion for reconsideration. The federal action asserts the same causes of action as those in the original and proposed amended complaints in state court, plus additional state and federal claims. The district court concluded that, were the state court to deny plaintiffs' motion to reconsider, then the federal claims

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[1] Plaintiffs also brought a second complaint against the physician and medical group and moved to amend their original complaint against these defendants. As to these defendants, the trial court denied the motion to amend and dismissed the second complaint. On appeal, the Superior Court affirmed the dismissal of the second complaint and the denial of the motion to add a claim under PUTCPA, and quashed the appeal as to the motion to add a claim for punitive damages. App. at 433-39.

would be dismissed on the basis of res judicata. Accordingly, the district court entered a stay pursuant to *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), pending disposition of the state court motion. *Estate of Menna v. St. Agnes Medical Center*, 1994 WL 585694, at *7 (E.D. Pa. Sept. 22, 1994).

Shortly after the district court entered its stay, the state court denied plaintiffs' motion for leave to amend their complaint to add an additional state claim. App. at 855.

The district court had subject matter jurisdiction over the state tort claims pursuant to 28 U.S.C. § 1332(a) based on the diversity of citizenship of the estate and hospital, and plaintiffs filed a timely notice of appeal of both the stay order and the denial of the motion for leave to amend. We have appellate jurisdiction to review a *Colorado River* stay order pursuant to 28 U.S.C. § 1291. *Trent v. Dial Medical of Florida, Inc.*, 33 F.3d 217, 222 (3rd Cir. 1994). *See also Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 8 (1983). Our review of the underlying legal questions is plenary, but we will review the ultimate decision to enter the stay for abuse of discretion. *Trent*, 33 F.3d at 223.

II.

As we observed in *Trent*, 33 F.3d at 222-23, the *Colorado River* "exceptional circumstances" basis for a district court to decline to exercise jurisdiction differs from the classic abstention doctrines. Traditionally, abstention may be proper if (a) a state court determination will avoid the

necessity of deciding a federal constitutional issue, *Railroad Com. of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941); (b) important questions of state law are raised, which may be better answered by the state courts, *Burford v. Sun Oil Co.*, 319 U.S. 315, 332-33 (1943); or (c) federal jurisdiction is invoked solely in an effort to restrain certain categories of state action, such as criminal or tax proceedings, *Younger v. Harris*, 401 U.S. 37, 41 (1971). It is undisputed that the traditional grounds for *Pullman*, *Burford*, and *Younger* abstention are not present here.

Rather, defendant maintains, and the district court agreed, that the narrow "exceptional circumstances" set forth in *Colorado River* are satisfied in this case. In *Colorado River*, the Supreme Court explained that a pendent state court action will not generally bar a federal action raising similar claims, given the "virtually unflagging obligation" of a federal court to adjudicate a case properly before it. *Colorado River*, 424 U.S. at 817. Nevertheless, " '[wise] judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation,' " *id.* (quoting *Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 343 U.S. 180, 183 (1952)), may lead a district court to defer the exercise of its otherwise proper jurisdiction. The *Colorado River* exception is met only where state and federal actions are "truly duplicative," *Trent*, 33 F.3d at 223, and consideration of various factors counsels deferring the exercise of jurisdiction. *Colorado River*, 424 U.S. at 818-19; *Trent*, 33 F.3d at 223, 225.

"Generally, cases are parallel so as to justify abstention under *Colorado River* when they involve the same parties and claims." *Trent*, 33 F.3d at 223. There is no

dispute that the parties in this action and the pending state court action are identical.

The parties contest, however, whether the claims are the same. In addition to those claims brought in the original state court complaint or sought to be added by the estate's motion to amend, the federal complaint asserts claims of "trespass," breach of contract, warranty and the "doctor-patient relationship," negligent and intentional misrepresentation, and fraud, as well as violations of the Medicare and False Claims Acts. The district court concluded that any new federal claims alleged by plaintiffs could have been brought in state court. *Menna*, 1994 WL 585694, at *7.

We agree that if plaintiffs lose their state court appeal, they will be estopped from relitigating in federal court those claims already raised in state court. In addition, we agree with the district court that the doctrine of claim preclusion will prevent plaintiffs from litigating their additional claims. "Claim preclusion, otherwise referred to as *res judicata*, gives dispositive effect to a prior judgment if the particular issue, albeit not litigated in the prior action, could have been raised." *Bradley v. Pittsburgh Bd. of Educ.*, 913 F.2d 1064, 1070 (3rd Cir. 1990). Nothing in the record persuade [sic] us that the additional claims could not have been raised previously. Consequently, we conclude that the federal and the state proceedings are sufficiently duplicative to meet the first *Colorado River* condition.

In *Trent*, we read *Colorado River* to define six factors relevant to whether "exceptional circumstances" merit abstention: 1) if property is involved, which court first

assumed jurisdiction over that property; 2) the inconvenience of the federal forum; 3) the desirability of avoiding piecemeal litigation; 4) the order in which the respective courts obtained jurisdiction; 5) whether federal or state law applies; and 6) whether the state court proceedings would adequately protect the federal plaintiffs' rights. *Trent*, 33 F.3d at 225; *Colorado River*, 424 U.S. at 818-19. We have emphasized that two factors are particularly important: avoiding piecemeal litigation and leaving adjudication of state law issues to the state courts. *Trent*, 33 F.3d at 225.

The district court determined that there is no property at issue, and that the location of the federal court in the same city as the state court favors the exercise of federal jurisdiction. *Cf. Colorado River*, 424 U.S. at 820 (in suit naming 1,000 defendants, federal court inconvenient where it is 300 miles from state court). We noted in *Trent*, however, that the convenience of the federal forum "cannot justify a decision to exercise jurisdiction when the countervailing factors weigh so heavily in favor of abstention". *Trent*, 22 F.3d at 225.

We agree with the district court that all other factors favor deferring the exercise of jurisdiction. First, piecemeal adjudication would be the inevitable result of permitting plaintiffs to proceed in federal court before the state court appeal has concluded, a factor which may be itself justify entry of a stay. *See, e.g., De Cisneros v. Younger*, 871 F.2d 305, 307-08 (2nd Cir. 1989); *Nakash v. Marciano*, 882 F.2d 1411, 1415 (9th Cir. 1989). Second, the state court obtained jurisdiction over these matters nearly a decade before the federal court. *Menna*, 1994 WL 585694, at *7 n.4. Third, plaintiffs' claims are entirely creatures of

state law, with the exception of two federal claims which plaintiffs are precluded from raising in any event. Finally, plaintiffs make no showing that the state court will not adequately protect their rights.

Accordingly, we conclude that the district court did not abuse its discretion in deferring the exercise of its jurisdiction. The district court elected to stay rather than dismiss the instant action, and because defendant does not cross-appeal from this determination we do not review it here. Because we will affirm the entry of the stay, we need not reach the appeal of the denial of leave to amend the complaint, which plaintiff does not raise in any event.

III.

For the foregoing reasons, we will affirm the order of the district court.

TO THE CLERK:

Please file the foregoing opinion.

/s/ H. Lee Sarokin
Circuit Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2040

THE ESTATE OF BERNICE MENNA; DANIEL MENNA, INDIVIDUALLY AND AS ADMINISTRATOR OF THE ESTATE OF BERNICE MENNA,

Appellants,

v.

ST. AGNES MEDICAL CENTER,

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil No. 94-2424)
District Judge: Donald W. VanArtsdalen

Before: GREENBERG, COWEN, and SAROKIN,
Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted under Third Circuit LAR 34.1(a) on August 24, 1995.

On consideration whereof, it is now here ordered and adjudged by this court that the judgments of the district court entered on September 23, 1994 and October 5, 1994 be and the same hereby are affirmed.

Costs taxed against appellant.

ATTEST:
/s/ P. Douglas Sike
Clerk

SEP 5 1995

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE ESTATE OF MENNA, et al.	:	CIVIL ACTION
v.	:	
ST. AGNES MEDICAL CENTER	:	NO. 94-2424

MEMORANDUM AND ORDER

(Filed Sept. 22, 1994)

VanARTSDALEN, S.J.

Background and Procedural History

On February 3, 1984, Bernice Menna, at the time a 73 year old woman with a history of medical complications, "became incapacitated" and was admitted to St. Agnes Medical Center. (Complaint, Exhibits A, E & G.) After 5 days as an inpatient she was discharged on February 8. (Complaint, Exhibit B.) On February 11, 1984, Menna was again admitted to St. Agnes, this time for four days, and was discharged on February 15. (Complaint, Exhibit E.) On February 17, 1984, Menna was admitted to Einstein Hospital, where she was diagnosed as having recently undergone a stroke. (Complaint, Exhibit G.) After an extended stay she was discharged from Einstein in April of 1984. (Complaint, Exhibit G.) On June 3, 1985, Bernice Menna died. (Complaint at 5.)

The litigation in this matter that now has nearly a 10 year history was begun on April 22, 1985, when Menna

filed a complaint against St. Agnes, as well as her attending physician, Dr. Segal, and Likoff-Segal Associates, in the Court of Common Pleas for the County of Philadelphia. For the sake of simplicity this action will be referred to as *Menna I*. Menna was represented by the law firm of Pelagatti & Bruccoleri. The complaint alleged that St. Agnes and Dr. Segal had failed to diagnose the stroke that Menna had suffered, and prematurely discharged her from the hospital both on February 8 and February 15 of 1984. Menna asserted a claim of negligence and medical malpractice. (Complaint, Exhibit A.)

Following two years of discovery, in July 1987, all counsel for the parties to *Menna I* executed a stipulation dismissing St. Agnes from the suit. The Court of Common Pleas entered an "Order and Stipulation of Dismissal" on September 23, 1987. (Defendant's Motion to Dismiss, Exhibit E.) The court's order, as well as the initial stipulation upon which it was based, stated that St. Agnes would be dismissed "with prejudice." (Defendant's Motion to Dismiss, Exhibits E & F.) The Court of Common Pleas docket sheet erroneously states that the dismissal was "without prejudice." (Defendant's Motion to Dismiss, Exhibit E.)

The case against the other defendants, Dr. Segal and Likoff-Segal Associates, continued. However, on January 12, 1990, Pelagatti & Bruccoleri withdrew their appearances, and John J. O'Brien, III entered an appearance on behalf of Daniel Menna, who had by then been appointed administrator of Bernice Menna's estate. O'Brien immediately took three steps.

On January 16, 1990, O'Brien, on behalf of plaintiffs Daniel Menna, Josephine Menna O'Brien (Bernice Menna's two children) and Daniel Menna as administrator of Bernice Menna's estate, filed a second complaint, initiating *Menna II.* In this complaint plaintiffs re-alleged the original medical malpractice claim asserted in *Menna I,* but added a claim under the Pennsylvania Unfair Trade and Consumer Protection Act, a claim for punitive damages, and a claim for losses suffered by Menna's children. (Defendant's Motion to Dismiss, Exhibit D.)

On January 18, 1990, the plaintiff petitioned the Court of Common Pleas for leave to amend the complaint filed in *Menna I* to include a claim for punitive damages, an Unfair Trade and Consumer Protection Act claim, and a claim for losses suffered by Menna's two children. (Defendant's Motion to Dismiss, Exhibit C.)

On January 23, 1990, Daniel Menna, as administrator of his mother's estate, and the sole plaintiff in *Menna I,* filed a "Motion to Strike the Discontinuance as to St. Agnes Medical Center." (Defendant's Motion to Dismiss, Exhibit E.) As grounds for striking the discontinuance, the plaintiff asserted that the dismissal of St. Agnes was without prejudice, and referenced the Court of Common Pleas docket sheet which did in fact state that the dismissal was "without prejudice." (Defendant's Motion to Dismiss, Exhibit D.) However, as mentioned above, the docket sheet was clearly incorrect. The plaintiff also asserted that his former attorneys, Pelagatti and Bruccoleri, never informed him that the suit against St. Agnes was discontinued.

Judge Lehrer of the Court of Common Pleas ruled on all of these motions, supporting his decisions in an opinion dated August 31, 1990. (Defendant's Motion to Dismiss, Exhibit H.) The court denied the motion to strike the discontinuance of the suit against St. Agnes. The court made findings of fact that the stipulation of dismissal was with prejudice and that the plaintiff was informed of the stipulation into which counsel had entered. The court also stated that forcing St. Agnes back into the litigation 3 years after it had been dismissed, would be highly prejudicial to St. Agnes.

The court permitted the plaintiff to amend the complaint in *Menna I* for the limited purpose of stating a cause of action for the out of pocket medical expenses of the deceased, but did not allow the plaintiff to add the statutory claim or the claim for punitive damages. *Menna II* was dismissed outright on the grounds of *lis pendens*.

The plaintiffs appealed Judge Lehrer's decisions to the Superior Court. On April 26, 1991, a three judge panel issued a memorandum opinion affirming the Court of Common Pleas. (Defendant's Motion to Dismiss, Exhibit I.) Plaintiffs thereafter filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court, which was denied.

In April of 1993, the claims remaining in *Menna I* against Segal and Likoff-Segal Associates, were settled. While this would seem to have concluded the matter, in fact, the litigation continued.

The plaintiff began another effort to have the claims against St. Agnes reinstated. In September 1993, plaintiff filed in state court a "Motion for Reconsideration of the

Denial of the Motion to Strike off the Discontinuance Based on After Discovered Evidence." (Defendant's Motion to Dismiss, Exhibit J.) The plaintiff claims that St. Agnes fraudulently concealed hospital records which indicate that the hospital knew at the time it discharged Menna that she was suffering from a recent stroke, and despite this knowledge discharged her anyway. Plaintiff also asserts that he recently obtained time sheets prepared by the law firm of Pelagatti & Bruccoleri, which he claims prove that he was never consulted about the stipulation which released St. Agnes from the case. This motion to reconsider has not yet been ruled upon, and, according to the defendant's present Motion to Dismiss, is still pending in the state court.

The plaintiff has also apparently filed an action for legal malpractice against the law firm of Pelagatti & Bruccoleri, alleging, *inter alia*, that he was never informed of the stipulation to discontinue the case against St. Agnes. This action I will call *Menna III*. Again according to the defendant's Motion to Dismiss, summary judgment in favor of Pelagatti & Bruccoleri was ordered. This order is currently on appeal to the Pennsylvania Superior Court.

During a deposition related to *Menna III*, the plaintiff claims he received additional medical records that St. Agnes had allegedly fraudulently concealed up to that time. On January 24, 1994, the plaintiff filed a Supplement to the Motion for Reconsideration of the denial of his motion to strike the discontinuance, informing the court of this development. (Defendant's Motion to Dismiss, Exhibit M.) Again, plaintiffs' motion, along with the

supplement to that motion, is still pending before the state court.

During this pause in the state court proceedings, Daniel Menna, individually and as administrator of the estate of Bernice Menna, and the estate of Bernice Menna, began a suit in federal court. On April 19, 1994, the plaintiffs filed the case presently before me, *Menna IV*. *Menna IV* asserts the same causes of action as in *Menna I* and *Menna II*.[1] Additionally, the complaint includes a count for "trespass," breach of warranties, breach of contract, negligent and intentional misrepresentation, fraud, violation of the Pennsylvania Unfair Trade and Consumer Protection Act, the Medicare Health Act, the False Claims Act, and breach of the "doctor-patient relationship."

On September 2, 1994, the plaintiffs filed a motion for default judgment which I denied for reasons set forth in my order dated September 12, 1994. Also on September 2, defendant St. Agnes filed the present Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). For the reasons stated below, I will not dismiss this case, but I will grant a stay of these proceedings until the state court litigation is complete.

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[1] In *Menna IV* plaintiff also avers, in an attempt to avoid the defense of statute of limitations and res judicata, that St. Agnes fraudulently concealed medical records. The exact nature of the fraud alleged is never made clear by the plaintiff who only vaguely refers to some sort of "conspirary" to evade discovery. The pleadings clearly do not comply with the basic requirement of Federal Rule of Civil Procedure 9(b). Rule 9(b) states: "in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

Defendant's Motion to Dismiss

Defendant St. Agnes argues that "res judicata bars plaintiffs' attempt to re-litigate this matter." (Defendant's Motion to Dismiss at 9.) They claim that a valid discontinuance of the claim against St. Agnes has already been adjudicated by the state court, and therefore the plaintiffs present action is barred.

In order to invoke the protection of res judicata three prerequisites must be established: the parties to the instant suit must be the same or in privity with those in the prior litigation; a court of competent jurisdiction must have entered a valid, final judgment on the merits; and the present action must concern the same subject matter or cause of action as the prior suit. *Coggins v. Carpenter,* 468 F. Supp. 270, 280 (E.D. Pa. 1979).

Certainly, the parties in the present suit are "the same or in privity with the parties in *Menna I,* and the instant action also concerns the same subject matter as *Menna I.*[2]

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[2] While it is true that the plaintiffs in the instant action assert claims under the Medicare Act and False Claims Act that were not pled in *Menna I,* this does not disturb my conclusion that both actions are sufficiently similar for purposes of invoking res judicata. The relevant question is "whether the claims 'arose out of the same transaction' or are predicated upon the same 'liability creating conduct.' " *Haefner v. County of Lancaster, Pennsylvania,* 543 F. Supp. 264, 267 (quoting *Cramer v. General Telephone & Electronics Corp.,* 582 F.2d 259, 267 (3d Cir. 1978), *cert. denied,* 439 U.S. 1129 (1979) and *Ley v. Boron Oil Co.,* 454 F. Supp. 448, 450 (W.D. Pa. 1978)). It is clear that the "core complaint" is the same in both *Menna I* and the instant suit. While some allegations raised in the federal complaint were not mentioned in the original complaint, the "liability creating conduct"

The question whether a "valid, final judgment on the merits" has been rendered in the previous litigation, however, is not answered so easily.

Defendant St. Agnes claims that the "voluntary stipulation to dismiss with prejudice [the claim against St. Agnes] is a final adjudication on the merits and is a bar to subsequent action." (Defendant's Motion to Dismiss at 10.) Defendant bases its claim of res judicata on the court order which gave effect to the stipulation dismissing St. Agnes. Defendant is correct in asserting that a discontinuance is generally afforded res judicata effect. *See Lawlor v. National Screen Service*, 349 U.S. 322, 327 (1955); *Samuels v. North Telecom, Inc.*, 942 F.2d 834, 836 (2d Cir. 1991); *Citibank NA v. Data Lease Financial Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990).

However, it appears that the Pennsylvania Court of Common Pleas order effectuating the discontinuance is presently being challenged. *See* Defendant's Motion to Dismiss at 5 & Exhibit J. In his Motion for Reconsideration the plaintiff claims that recently discovered time sheets created by his former attorney prove that he was never informed of the stipulation dismissing St. Agnes. Plaintiff also asserts that relevant medical records,

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in both suits is the behavior of the defendant during February of 1985, when Bernice Menna was treated (or, as the plaintiffs claim, mistreated) by St. Agnes Medical Center.

Furthermore, the real question here is whether the discontinuance of the claim against St. Agnes is valid or not, not the merits of the suit, and that issue has certainly been presented to the state court in precisely the same manner as it is urged before me.

allegedly fraudulently concealed by St. Agnes, and presumably inculpatory, had just recently come to his attention. The fact that a motion attacking the order upon which res judicata is premised is currently before the state court begs the question of whether it nevertheless constitutes a "valid, final judgment" with attendant res judicata effect.

When a party relies on a state court judgment to preclude relitigation in federal court, a federal court must look to the state law and its appraisal of the collateral estoppel doctrine to ascertain the extent to which the state would give its own judgment collateral estoppel effect. *Davis v. United States Steel Supply*, 688 F.2d 166, 170 (3d Cir. 1982) (en banc), cert. denied, 460 U.S. 1014 (1983). The status of Pennsylvania law on this point has been the subject of two Third Circuit opinions.

In *Bailey v. Ness*, 733 F.2d 279 (3d Cir. 1984), the court noted that in Pennsylvania there are "two distinct lines of cases dealing with the issue of whether a judgment is indeed final in those instances where there has been an appeal." *Id.* at 281. One set of cases holds that a state court judgment is not considered a final judgment for purposes of res judicata if an appeal is pending. *See Souter v. Baymore*, 7 Pa. 415 (1848); *Smalls Appeal*, 15 A. 807 (1888); *Columbia National Bank v. Dunn*, 207 Pa. 548, 56 A. 1087 (1904); and *Bryar v. Campbell*, 177 U.S. 649 (1900) (interpreting Pennsylvania law). Two federal court opinions, applying Pennsylvania law, have adopted this view. *See United States v. Employers Mutual Liability Insurance Co. of Wisconsin*, 495 F. Supp. 840, 842 (W.D. Pa. 1980) and *In re Levitt*, 18 B.R. 595, 598 n.11 (E.D. Pa. 1982).

Alternatively, other decisions have held that a judgment by a state court is considered final for res judicata purposes "unless or until it is reversed." *Philadelphia Electric Co. v. Pennsylvania Public Utility Commission*, 61 Pa. Commw. Ct. 325, 337, 433 A.2d 620, 626 (1981) (citation omitted); *Rheem v. The Naugatuck Wheel Co. of Wisconsin*, 33 Pa. 356 (1859); *Woodward v. Carson*, 86 Pa. 176 (1878); *Elkin's Petition*, 289 Pa. 327, 137 A. 459 (1927); *Wallace's Estate*, 316 Pa. 148, 174 A. 397 (1934); *Helmig v. Rockwell Manufacturing Co.*, 389 Pa. 21, 131 A.2d 622, *cert. denied*, 355 U.S. 832, *reh'g denied*, 355 U.S. 885 (1957). Several federal courts applying Pennsylvania law have also taken this position. *Commercial Union Assurance Co. v. Pucci*, 523 F. Supp. 1310, 1318 (W.D. Pa. 1981); *In re Meade Land and Development Co., Inc.*, 1 B.R. 279, 283 (E.D. Pa. 1980).

The *Bailey* court, faced with uncertain state law, was "reluctant to adopt an interpretation which may prove erroneous if we can avoid making such a determination." *Bailey*, 733 F.2d at 282. Instead, the court followed the approach of the Fifth Circuit in similar circumstances: "[i]rrespective of whether the judgment in the state court operated as res judicata pending appeal, the federal court should take into consideration the possibility of a reversal of that judgment. . . . and stay further proceedings until final disposition of the case in the state courts." *Bailey*, 733 F.2d at 282 (quoting *Occidental Life Ins. Co. of California v. Nichols*, 216 F.2d 839, 841 (5th Cir. 1954)).

The Third Circuit, in a 1993 opinion, opted for the very same tact. In *Linnen v. Armainis*, 991 F.2d 1102 (3d Cir. 1993), the court held that a state court defendant's appeal of a postconviction motion within the state court system, warranted a stay of his § 1983 action in federal

court until the state courts rendered final judgment. The *Linnen* court noted that the Third Circuit's opinion in *Bailey* recognized the "uncertain[ty] in Pennsylvania law on what effect an appeal has on an otherwise final order." *Linnen*, 991 F.2d at 1107. However, the *Linnen* court went on to state that "since *Bailey*, the Commonwealth Court of Pennsylvania has twice unequivocally decided that a state trial court judgment is final unless or until reversed." *Id.* Those two cases are: *O'Hara Sanitation Co. v. Commonwealth Dep't of Envtl. Resources*, 125 Pa. Commw. Ct. 441, 557 A.2d 453, 455 (1989) (citing *Philadelphia Elec. Co. v. Pennsylvania Pub. Util. Comm'n*, 61 Pa. Commw. Ct. 325, 433 A.2d 620, 626 (1981)), and *Bassett v. Civil Serv Comm'n of Philadelphia*, 100 Pa. Commw. Ct. 356, 514 A.2d 984, 986 (1986) (citing *Philadelphia Elec. Co.*, 433 A.2d at 626). Despite what appears to be greater certainty on this issue in the Pennsylvania courts, the *Linnen* court nevertheless concluded that it was unnecessary to determine whether the "conflict in Pennsylvania law" had been settled, because a stay of the federal action "pending ultimate disposition" of the appeal in state court was the appropriate course. *Linnen*, 991 F.2d at 1107, 1109.

Both *Bailey* and *Linnen* involved state criminal convictions and federal civil rights actions. The instant case involves medical malpractice. Despite this difference, the rationale leading the courts in those cases to issue a stay, is equally applicable here.[3] As the *Bailey* court stated: "in

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[3] Arguably, *Bailey* and *Linnen* are also distinguishable because they both involved a direct appeal from a state court judgment, while the instant case involves a motion for reconsideration based on new evidence. Research revealed no Pennsylvania case addressing the question of what impact a motion

according preclusive effect to the decisions of state court, collateral estoppel serves to promote comity between state and federal courts." *Bailey*, 733 F.2d at 282. That aim would be well-served in the instant case by affording the state court an opportunity to complete its adjudication of this case that has been before it since 1985, and, quite possibly, is just a short step away from ultimate conclusion.

The *Bailey* and *Linnen* courts apparently reached their decisions without considering the Supreme Court's 1976 opinion in *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976). *Colorado River* provides a framework for analyzing when a federal court should dismiss or stay an action pending the outcome of parallel state court litigation. The *Colorado River* court noted that generally "the pendency of an action in the state court is no bar to the proceedings concerning the same matter in the Federal court." *Colorado River*, 424 U.S. at 817. The

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for reconsideration has on the res judicata effect of the judgment the court has been asked to reconsider. If anything, this added uncertainty makes the instant case an even better candidate for a stay than *Bailey* and *Linnen*.

Also, the plaintiffs argue that the original discontinuance was tainted by fraud because St. Agnes fraudulently concealed records. (Plaintiff's Answer to Defendant's Motion to Dismiss at 12.) There is case law to support the claim that a settlement fraudulently induced does not have res judicata effect. *See Burke v. Geotech Development Corp.*, No. 87-6739, 1989 U.S. Dist LEXIS 2945 (E.D. Pa. March 22, 1989) ("it is well established that the essence of contract law relates to the objective intent of the parties, and where there is an allegation of mistake, fraud, overreaching, or the like, there can be no contract.") However, these ill-defined, nonspecific claims of fraud have been raised and are pending before the state court.

court based this statement on what it deemed the "virtually unflagging obligation" of a federal court to adjudicate claims that are properly presented and within their subject matter jurisdiction. *Id.* A district court may decline to exercise its jurisdiction only where there are "exceptional circumstances." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 25-26 (1983).

The determination whether to dismiss under the "exceptional circumstances" test "does not rest on a mechanical checklist, but on a careful balance of the important factors as they apply in a given case." *Moses H. Cone*, 460 U.S. at 16. The weight to be given any one factor may vary from case to case and no one factor is determinative. *Id.* In the Third Circuit, "those factors which govern a district court's discretion in deciding whether to abstain under *Colorado River* are:

> (1) which court first assumed jurisdiction over property involved, if any;
>
> (2) whether the federal forum is inconvenient;
>
> (3) the desirability of avoiding piecemeal litigation;
>
> (4) the order in which the respective courts obtained jurisdiction;
>
> (5) whether federal or state law applies; and
>
> (6) whether the state court proceeding would adequately protect the federal plaintiff's rights."

Trent v. Dial Med. of Florida, Inc., No. 92-2047, 1994 U.S. App. LEXIS 21369, at *23 (3d Cir. Aug. 12, 1994).

There is no property over which any court has exercised jurisdiction, rendering that factor irrelevant. The

federal and state courts are equally convenient in this case because both courts are located in Philadelphia.

The third and fourth factors weigh heavily in favor of a stay. The state court litigation preceded the filing of the federal complaint by nearly a decade.[4] This fact strongly counsels in favor of granting a stay. *See Cory v. Mark Twain Life Ins. Co.*, 604 F. Supp. 226, 229 (E.D. Ark. 1984) (state court obtained jurisdiction of the suit almost five years before the federal court and the district court ordered a stay). "It is not in the interest of wise judicial administration for a federal court to entertain a suit in which the state court has invested significant resources" and will soon issue a decision which may preclude any further action. *Liberty Mut. Ins. Co. v. Ward Trucking Corp.*, No. 93-3154, 1994 U.S. Dist LEXIS 3975 (E.D. Pa. March 31, 1994).

The avoidance of piecemeal litigation also militates in favor of a stay. Although I offer no opinion as to the merits of the plaintiff's pending state court motion for reconsideration, obviously, if the motion is denied and the discontinuance thereby affirmed, res judicata will bar any action by the plaintiffs against St. Agnes. It seems inconceivable to devote judicial resources, and taxpayer money, to entertaining a suit which may very well be precluded as soon as the state court decides the plaintiff's motion. I find that these two factors clearly point toward issuing a stay of these proceedings.

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[4] The state court complaint was filed in April 1985; the federal court complaint was filed in April 1994.

The remaining two factors do not alter the balance. There is no reason to believe that the state court would not adequately protect the rights of the federal plaintiff in this case. Also, to the extent the plaintiffs assert claims under federal statutes that are not being considered by the state court, this is due to plaintiff's failure to include those claims in the initial state court complaint, not a function of the state court system itself.

The *Colorado River* court noted that a stay or dismissal by the federal court in the face of a concurrent and related state case is permitted on the grounds of "wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River,* 424 U.S. at 817. All of these worthy aims are met by allowing the state court litigation, ongoing for over nine years, to conclude before entertaining another suit on the same issues in federal court.

Although *Colorado River* counsels caution, federal courts have hardly quit the business of granting stays or dismissals during ongoing state court proceedings. Examples of cases where "extraordinary circumstances" were deemed to exist include: *Trent v. Dial Med. of Florida,* 1994 U.S. App. LEXIS 21369 at *23; *Liberty Mut. Ins. Co. v. Ward Trucking Corp.,* 1994 U.S. Dist. LEXIS 3975 at *13; *Fidelty Federal Bank v. Larken Motel Co.,* 764 F. Supp. 1014, 1019 (E.D. Pa. 1991); *Shearson, Lehman, Hutton, Inc. v. Skewes,* No. 90-2353, 1991 U.S. Dist LEXIS 1340 at *8 (Kan., January 30, 1991); *Dame v. Monahan,* 758 F. Supp. 1042 (M.D. Pa. 1991); *Samaroo v. Samaroo,* 743 F. Supp. 309, 317-18 (D. N.J. 1990); *Aetna Casualty & Surety Co. v. Sterner,* 700 F. Supp. 252, 257 (E.D. Pa. 1988); *Cory v. Mark Twain Life Ins. Co.,* 604 F. Supp. 226, 229 (E.D. Ark. 1984).

Whether following the *Bailey* and *Linnen* decisions, or the guidelines promulgated in *Colorado River*, I find that the most prudent course in the instant case is to stay the federal action pending the final outcome of the state court litigation. If the state court ultimately concludes that the discontinuance against St. Agnes is valid, then any further action by the plaintiffs against St. Agnes in federal court will be res judicata.

An appropriate order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

THE ESTATE OF MENNA, et al.	:	CIVIL ACTION
v.	:	
ST. AGNES MEDICAL CENTER	:	NO. 94-2424

ORDER

For the reasons set forth in the accompanying memorandum, the defendant's Motion to Dismiss is DENIED. This action, however, is STAYED pending resolution of the parties' parallel state action.

The Clerk of the Court is directed to place civil action 94-2424 in the Court's Suspense Docket.

The parties shall advise the Court of any final disposition of the pending state court actions.

BY THE COURT:

/s/ Donald W. VanArtsdalen
Donald W. VanArtsdalen, S.J.

September 21, 1994

ENTERED: 9-23-94
Clerk of Court

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2040

THE ESTATE OF BERNICE MENNA; DANIEL MENNA,
INDIVIDUALLY AND AS ADMINISTRATOR OF
THE ESTATE OF BERNICE MENNA,
Appellants,

v.

ST. AGNES MEDICAL CENTER,

(D.C. Civil No. 94-2424)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*
BECKER, STAPLETON, MANSMANN, GREENBERG,
*HUTCHINSON, SCIRICA, COWEN, NYGAARD,
ALITO, ROTH, LEWIS, McKEE, and SAROKIN,
Circuit Judges

The petition for rehearing filed by appellants in the above-entitled case having been submitted to all circuit judges of the circuit in regular active service, and a majority of such circuit judges not having voted for

rehearing by the Court *in banc,* the petition for rehearing is denied.

BY THE COURT,

/s/ H. Lee Sarokin
Circuit Judge

DATED: OCT 12 1995

APPENDIX D

November 7, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2040

Re: Estate Bernice Menna v St Agnes Med Ctr

Present: GREENBERG, COWEN and SAROKIN, *Circuit Judges*

1. Motion filed by Appellee St. Agnes Medical Center for attorney's fees in the amount of $8,055.00 and double costs in the amount of $334.80.

2. The memorandum opinion in this appeal was filed on September 5, 1995, the order denying appellant's petition for rehearing was filed on October 12, 1995 and the mandate issued on October 20, 1995.

3. Appellee's bill of costs form in the amount of $334.80 submitted on September 19, 1995 was filed and added to the mandate. Please note that in appellee's request for double costs, they are only requesting an additional $334.80.

4. Any response to the above motion due November 6, 1995 has been received and is attached.

/s/ Colleen McKeown
Colleen McKeown
Deputy Clerk
Direct Dial 597-4495

ORDER

The forgoing motion is/~~are~~ granted

By the Court,

/s/ H. Lee Sarokin
Circuit Judge

Dated: NOV 21 1995

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2040

Estate Bernice Menna

v

St. Agnes Med Center

It is ORDERED that the motion to recall and stay the mandate is DENIED because no substantive right of the applicant will be affected by failure to grant the stay of mandate. This is without prejudice to the applicant's right to file a timely petition for writ of certiorari.

/s/ H. Lee Sarokin
Circuit Judge

Dated: NOV 21 1995

APPENDIX F

December 11, 1995

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-2040

Re: Estate Bernice Menna v St Agnes Med Ctr

Present: GREENBERT, COWEN and SAROKIN, *Circuit Judges*

1. Document entitled "Motion for Rehearing En Banc on Asessment [sic] of Attorney's Fees against the Estate of Bernice Menna" which the Court may wish to treat as a motion to reconsider the court order granting appellee's motion for attorney's fees.

2. The memornadum opinion in this appeal was filed on September 5, 1995, the order denying appellant's petition for rehearing in banc was filed on October 12, 1995, the mandate issued on October 20, 1995, the order denying appellant's motion to recall the mandate was filed on November 21, 1995 and the order granting appellee's motion for attorney's fees was filed on November 21, 1995.

3. Any response to the above motion due December 8, 1995 has not been received.

/s/ Colleen McKeown
Colleen McKeown
Deputy Clerk
Direct Dial 597-4495

ORDER

The forgoing motion is/are denied.

By the Court.

/s/ H. Lee Sarokin
Circuit Judge

Dated: DEC 21 1995